

OCT 23 2000

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Part 1 of the Commission's) WT Docket No. 97-82
Rules - Competitive Bidding Procedures)

To: The Commission

**COMMENTS IN SUPPORT OF
PETITIONS FOR RECONSIDERATION**

Respectfully submitted,

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Summary

Neoworld License Holdings, Inc., an indirect, wholly-owned subsidiary of Neoworld License Holdings, LLC (“Neoworld” or the “Company”) respectfully submits these comments in support of the petitions for reconsideration filed in this proceeding. Neoworld adds its voice to those who urge the Commission to reconsider and/or clarify its newly promulgated “controlling interest” attribution rules which, as currently written, deem directors of an entity to have a controlling interest in the entity.

Neoworld supports the Rural Telecommunications Group and others in requesting that the Commission re-examine this language. In adopting this standard, the Commission has failed to explain or rationalize its substantive departure from the rules it cited as precedent for this provision. For the reasons described below, the result may be overly stringent, unnecessary and contrary to the FCC’s recognition of the important role institutional investors can play in promoting the development of small businesses.

Among the Commission’s stated goals in this proceeding was to adopt a simpler and consistent set of attribution rules for determining small business eligibility for all future auctions. Its premise in adopting the controlling interest rule was to ensure that the gross revenues of all parties that control an applicant or have the power to control an applicant, and their affiliates, are attributed to the applicant. Another aim was to provide legitimate small businesses maximum flexibility in attracting passive investor financing.

However, in Neoworld’s opinion, retention of the rule at issue in respect to directors would ill-serve the FCC’s avowed objectives. It results in an automatic determination that each and every director “controls” an applicant regardless of the actual rights and responsibilities of the specific

director or any legal restrictions on a director's ability to control the entity.

Neoworld submits that if an applicant can demonstrate that it has developed insulating mechanisms to prevent a director from exercising authority or influence in areas such as the day-to-day operations and management of an entity, then that director should not be considered to have a controlling interest. Should the Commission not modify its rules to reflect that control is only a possibility, not a conclusion, through the occupancy of a director's seat, it should make the presumption of control rebuttable, similar to its position with respect to familial relationships

If the Commission does not modify its attribution rules, the result not only will be unfair by placing investment restrictions on new entrants which do not apply to existing licensees, but also will have a chilling effect on the very institutional investments the Commission has concluded are essential to successful small business participation in the highly competitive telecommunications marketplace. In contrast, the alternative amendments of the Commission's rules discussed herein will provide flexibility that will enable legitimate small businesses to attract passive financing in a highly competitive and evolving telecommunications marketplace. It will serve the public interest by increasing investment in the industry and by promoting the entry of new participants by increasing the availability of start-up capital to these entities. Accordingly, Neoworld respectfully requests that the FCC act expeditiously in refining the controlling interest standard as it pertains to directors as described herein.

Neoworld License Holdings, Inc., an indirect, wholly-owned subsidiary of Neoworld License Holdings, LLC (“Neoworld” or the “Company”), by its attorneys and pursuant to Section 1.429(f) of the Federal Communications Commission (“FCC” or “Commission”) Rules,¹ respectfully submits these comments in support of the petitions for reconsideration filed in the above-referenced proceeding.² Neoworld adds its voice to those who urge the Commission to reconsider and/or clarify its newly promulgated “controlling interest” attribution rules which, as currently written, deem directors of an entity to have a controlling interest in the entity.

I. Introduction

Neoworld was created for the purpose of developing a unique digital 900 MHz Specialized Mobile Radio (“SMR”) dispatch network designed to provide businesses with services that will enhance their internal communication with and management of mobile employees. To achieve the full national presence demanded Neoworld intends to expand its channel position via the acquisition of additional spectrum. That initiative may require the Company to consider purchasing channels from entities which acquired their authorizations in previous auctions and qualified for small business status; it also may lead Neoworld to participation in future auctions. Under either scenario, the Company may need to apply the affiliation rules adopted in the above-captioned proceeding to determine if it qualifies as a small business.

¹ See 47 C.F.R. § 1.429(f); In the Matter of Amendment to Part 1 of the Commission’s Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, WT Docket No. 97-82, FCC 00-274 (rel. Aug. 14, 2000)(“*Order*”).

² See TeleCorp PCS, Inc., Tritel Communications, Inc., Poplar PCS, LLC and Summit Wireless, LLC, *Petition for Clarification or Reconsideration* (file Sept. 28, 2000)(“*TeleCorp Petition*”), Eliska Wireless Ventures I, Inc., *Petition for Expedited Clarification or Reconsideration* (filed Sept. 28, 2000)(“*Eliska Petition*”), The Rural Telecommunications Group, *Petition for Reconsideration* (filed Sept. 28, 2000)(“*RTG Petition*”).

II. Discussion

In the *Order*, the Commission amended its auction rules by, *inter alia*, adopting as a general attribution rule a “controlling interest” test for determining which entities qualify for small business status.³ Adoption of this single standard for all auction services was part of the FCC’s effort to “establish a uniform streamlined set of general competitive bidding rules for all auctionable services.”⁴ Under this controlling interest test, the FCC will rely on the principles of *de jure* or *de facto* control in identifying attributable interests in an auction applicant and, therefore, in determining whether an applicant qualifies for small business treatment.

Among the changes adopted was one with respect to the status of an entity’s officers and directors. Newly adopted Rule Section 1.2110(c)(ii)(F) provides in unqualified terms that:

officers and directors of an entity shall be considered to have a controlling interest in the entity. The officers and directors of any entity that controls a licensee or applicant shall be considered to have a controlling interest in the licensee or applicant.⁵

Neoworld supports RTG and others in requesting that the Commission re-examine this language. In adopting this standard, the Commission has failed to explain or rationalize its departure from the rules it cited as precedent for this provision. For the reasons described below, the result may be overly stringent, unnecessary and contrary to the FCC’s recognition of the important role institutional investors can play in promoting the development of small businesses.

³ *Order* at ¶¶ 59-67.

⁴ *Id.* at ¶ 1.

⁵ *See Id.* at ¶ 63 (“We note too that, under the controlling interest standard, the officers and directors of any applicant will be considered to have a controlling interest in the applicant.”).

A. The Commission Did Not Explain Its Departure From Stated Precedent.

The genesis of this Order was the *Part 1 Third Report and Order and Second Further Notice of Proposed Rule Making* in this proceeding.⁶ The *Part 1 Third Report and Order* streamlined the Commission's uniform set of rules for all auctionable services. The affiliation rules associated with the decision were consistent with those adopted for auctionable licenses in the Local Multipoint Distribution Service ("LMDS") and 800 MHz Specialized Mobile Radio ("SMR") MHz services, both of which stated:

Control *can* arise through stock ownership; occupancy of director, officer, or key employee positions; contractual or other business relations; or combinations of these and other factors...⁷

The affiliation section of the *Part 1 Third Report and Order* contained no discussion with respect to the attribution of officers and directors.⁸

The *Part 1 Second Notice* affirmed that the Commission's intent was to adopt as the general attribution rule for all future auctions a controlling interest standard similar to that which was adopted for LMDS.⁹ It invited further comment on the standard and whether it was sufficient to calculate size so that only those entities truly meriting small business status qualified for bidding

⁶ Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) ("*Part 1 Third Report and Order*" and "*Part 1 Second Notice*").

⁷ *Part 1 Third Report and Order*, Appendix D, Final Rules, containing Rule Section 1.2110(4)(ii)(B)(emphasis added).

⁸ *Id.* at ¶¶ 26-30.

⁹ *Part 1 Second Notice* at ¶ 185.

credits.¹⁰ It did not contain any discussion about the attributable interest of an officer or director of an applicant.

In the instant *Order* the Commission asserts that the controlling interest approach adopted is the same one used in the LMDS, 800 MHz SMR, 220 MHz, VHF Public Coast and Location and Monitoring Service (“LMS”) auction proceedings.¹¹ Neoworld submits that this is not entirely accurate.

As indicated above, the LMDS, 800 MHz SMR and 220 MHz rules all specify that an officer or director of an applicant *could* be found to exercise control of an applicant and therefore be considered an affiliate of the applicant:

Control *can* arise through stock ownership; occupancy of director, officer, or key employee positions; contractual or other business relations; or combinations of these and other factors...¹²

By contrast, the Public Coast and LMS rules eliminated this flexibility, stating instead that all officers and directors of an applicant have an attributable interest in the applicant:

Officers and directors of an entity *shall* be considered to have an attributable interest in the entity.¹³

¹⁰ *Id.*

¹¹ Order at ¶ 59 *citing* 47 C.F.R. §§ 1112 (LMDS); 90.912 (800 MHz SMR), 90.1021 (220 MHz), 80.1252(c) Public Coast) and 90.1103(c) (LMS).

¹² 47 C.F.R. §§ 1112 (LMDS); 90.912 (800 MHz SMR) and 90.1021 (220 MHz)(emphasis added).

¹³ 47 C.F.R. §§ 80.1252(c) (Public Coast) and 90.1103(c) (LMS)(emphasis added).

The *LMS Order* did not explain its rigid approach and departure from the other affiliation rules.¹⁴ In fact, its intent appeared to be the opposite, as it explained in the background discussion that the “controlling interest” standard proposed in the Part 1 proceeding was similar to the standard previously adopted for LMDS.¹⁵ It further stated that the Part 1 affiliation rules were workable and warranted no change.¹⁶

Similarly, the *Public Coast Order* did not offer any rationale for its departure from precedent. Instead it erroneously asserted that its approach under Part 80 was consistent with the Part 1 proceeding and similar to the attribution rules employed for the LMDS and 800 MHz SMR auction proceedings.¹⁷

The *Order* repeats the misstatement. The Commission should remedy its error by correcting Rule Section 1.2110(c)(ii)(F) to be consistent with its stated precedent, or explain the departure in sufficient detail to support this substantive change.

B. The Commission Must Allow Small Businesses Flexibility In Structuring Their Financial and Organizational Arrangements.

¹⁴ In the Matter of Amendment of Part 90 of the Commission’s Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Second Report and Order*, PR Docket No. 93-61, FCC 98-157, 13 FCC Rcd 15182 (1998)(“*LMS Order*”).

¹⁵ *Id.* at ¶ 21.

¹⁶ *Id.* at ¶ 27.

¹⁷ Amendment of the Commission’s Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order*, PR Docket No. 92-257, 13 FCC Rcd 19853, 19859, ¶ 67(1998) (“*Public Coast Order*”).

Among the Commission's stated goals in this proceeding was to adopt a simpler and consistent set of attribution rules for determining small business eligibility for all future auctions.¹⁸ Its premise in adopting the controlling interest rule was to ensure that the gross revenues of all parties that control an applicant or have the power to control an applicant, and their affiliates, are attributed to the applicant.¹⁹ Another aim was to provide legitimate small businesses maximum flexibility in attracting passive investor financing.²⁰

Neoworld supports both objectives. The Commission's intent in providing meaningful opportunities for small businesses in auctioned services would not be served by allowing entities with assets in excess of the small business maximum to control the activities of an ostensible qualifying small business applicant. Conversely, the FCC is correct in its determination that its rules should "provide legitimate small businesses maximum flexibility in attracting passive financing."²¹ The Commission specifically declined to establish a minimum equity requirement for small business eligibility on the basis that such a policy would:

limit a small business's ability to raise capital and undermine our intention of promoting small business participation in the highly competitive telecommunications marketplace.²²

However, in Neoworld's opinion, retention of the rule at issue in respect to directors would ill-serve the FCC's avowed objectives. It results in an automatic determination that each and every

¹⁸ *Order* at ¶¶ 58-59.

¹⁹ *Id.* at ¶ 60.

²⁰ *Id.* at ¶ 65.

²¹ *Order* at ¶ 65.

²² *Id.*

director “controls” an applicant regardless of the actual rights and responsibilities of the specific director or any legal restrictions on a director’s ability to control the entity. It is unclear whether this untoward result could be avoided by establishing a management committee or some other vehicle to perform the functions of a board or by organizing the applicant as a limited partnership or other non-corporate entity.

In its Petition, RTG provides one example of a situation where the actual rights and responsibilities of directors are inconsistent with the Commission’s determination or with the applicable legal determination as to the *de facto* or *de jure* control of the applicant. The same would be true if a voting agreement or similar arrangement legally prevented certain directors from exercising either *de facto* or *de jure* control of a small business entity. The result would be entirely inconsistent with the Commission’s avowed objective of ensuring that the assets of only entities with *de facto* or *de jure* control are attributed to an applicant.²³

This conclusion is also contrary to the Commission’s history of recognizing that certain limitations on minority rights may insulate the holder of the rights from directly or indirectly influencing or control over a licensee. For example, in the media multiple ownership arena,²⁴ the Commission exempts from attribution limited partners who are not materially involved, directly or

²³ RTG explains that the no individual officer or director of a rural telephone cooperative has the power to control the cooperative, that all significant cooperative action must be approved by a majority of the directors and that ultimate control rests with the subscriber-members who regularly elect their representatives to the board. *RTG Petition* at 8.

²⁴ Neoworld is not suggesting that the Commission modify its auction rules to conform more closely to the broadcast attribution rules, as the policy concerns that led to the adoption of the two sets of rules are not identical. The primary basis for the instant rules is to ensure that only *bona fide* small businesses qualify for whatever rights are available. In broadcasting and cable, the attribution rules are intended to promote programming diversity.

indirectly, in the management or operation of the media-related activities of the partnership if the licensee so certifies.²⁵ Such limited partners are restricted from communicating with the licensee on matters pertaining to the day-to-day operations of its business or performing any services relating, in any material respect, to its media activities.²⁶ Subject to these limitations, a limited partner may enjoy other rights -- the same ones typically demanded by institutional investors with a corporate board seat.

In determining who has control of an entity, the Commission looks beyond the licensee or applicant to include contractual relationships of the entity. For example, the Commission determined that it will make attributable the gross revenues of those that have management or marketing agreements with the applicant or licensee where such agreements grant authority over key aspects of the applicant's or licensee's business.²⁷ A fair and balanced approach would be to recognize that in addition to extending authority over an entity, contractual relationships may also internally limit authority over a business. Accordingly, an entity should be permitted to insulate a director from a determination of control if it can demonstrate the existence of an internal mechanism which prohibits such director's control over key aspects of the entity's business.

²⁵ See Corporate Ownership Reporting and Disclosure of Broadcast Licensees, Docket No. 20521, *Memorandum Opinion and Order*, FCC 86-410, 1 FCC Rcd 802 (1986) citing Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Televisions and Newspaper Entities, MM Docket No. 83-46, FCC 85-252 *Report and Order*, 97 FCC 2d 997, 1022-23 (1984) *recon. Memorandum Opinion and Order*, FCC 85-252, 50 Fed. Reg. 27438 (rel. June 24, 1985) ("Media Attribution Recon Order").

²⁶ *Media Attribution Recon Order* at ¶¶ 49-50.

²⁷ *Order* at ¶ 64.

The Commission has long recognized that “passive” institutional investors differ from other investors:

With rare exceptions, the banks are passive investors who manage the trusts for investment purposes for the beneficiaries and not to control the management or policies of a broadcast company.²⁸

Institutional investors [insurance companies, investment companies, bank trust departments] play passive investment roles.²⁹

These passive investors are not involved in a licensed system’s core functions. The director appointed by such investors typically has duties and responsibilities unrelated to the activities of the licensee.

Neoworld submits that if an applicant can demonstrate that it has developed insulating mechanisms to prevent such a director from being materially involved directly or indirectly in the management or operation of the telecommunications activities of the licensee, then that director should not be considered to have a controlling interest. If such mechanisms are not in place, then the general “controlling interest” standard would cause the director’s interest to be deemed attributable.³⁰

²⁸ Corporate Ownership Reporting and Disclosure of Broadcast Licensees, Docket No. 20521, *Report and Order*, 97 FCC 2d 997 ¶ 32 (1984)(“*Corporate Ownership Order*”) citing Amendment of Sections 73.35, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Docket No. 18751, *Report and Order*, 34 FCC 2d 889, 892 (1972).

²⁹ *Corporate Ownership Order* at ¶ 32 citing *Report and Order* in Docket No. 20520, 59 FCC 2d 970 (1976), *recon. granted in part*, 65 FCC 2d 336 (1977), *aff’d sub nom. National Citizens Committee for Broadcasting v. FCC*, 559 F.2d 189 (D.C. Cir.), cert. denied, 434 U.S. 987 (1977).

³⁰ See *RTG Petition* at 8.

Should the Commission not modify its rules to reflect that control is only a possibility, not a conclusion, through the occupancy of a director's seat, it should make the presumption of control rebuttable, similar to its position with respect to familial relationships.³¹ Neoworld proposes that under this approach, eligible directors would be accorded exemption from attribution upon submission by the licensee, in conjunction with its ownership report or in conjunction with a relevant application, of the individual's name, his full title, and a description of his duties and responsibilities, along with an explanation of why the assets of that director should not be attributed to the entity.

III. Conclusion

Should the Commission not modify its attribution rules, the result not only will be unfair by placing investment restrictions on new entrants which do not apply to existing licensees,³² but also will have a chilling effect on the very institutional investments the Commission has concluded are essential to successful small business participation in the highly competitive telecommunications marketplace. Without the ability to appoint a board member, and thereby obtain important routine

³¹ See 47 C.F.R. § 1.2110(b)(4)(iii)(B).

³² The Commission has repeatedly stated its intent to provide a "level playing field" for small businesses, entrepreneurs and similar entities. However, should the Commission not amend its rules in the manner described herein, new entrants will be at a distinct disadvantage to the already-licensed entity, as eligibility for small business preferences are determined based on the attribution rules in effect at the time of an applicant's short-form filing. *Order* at ¶ 67. For example, the Order specifically provides that current C and F block licensees will remain eligible to hold their licenses regardless of whether or not they would qualify under the newly established rules. *Id.* These licensees' small business eligibility was determined using a control group test. See 47 C.F.R. § 24.709(b); see also *TeleCorp Petition*. Accordingly, it is theoretically possible that a large corporation such as General Motors could have the right to a board seat with respect to one of these licensees - a right denied new investors, no matter how insulated that director may be from the ability to direct a licensee's activities.

information with respect to their investment, passive investors will identify alternative vehicles in which to invest their funds.

In contrast, the alternative amendments of the Commission's rules discussed herein will provide flexibility that will enable legitimate small businesses to attract passive financing in a highly competitive and evolving telecommunications marketplace. It will serve the public interest by increasing investment in the industry and by promoting the entry of new participants by increasing the availability of start-up capital to these entities. Accordingly, for the reasons herein, Neoworld respectfully requests that the FCC act expeditiously in refining the controlling interest standard as it pertains to directors as described herein.

CERTIFICATE OF SERVICE

I, Linda Evans, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this October 23, 2000 caused to be mailed, first-class, postage prepaid, a copy of the foregoing Comments to the following:

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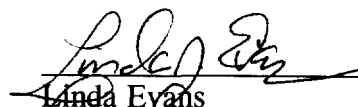
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